

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

**JOHN McCain a/k/a
Amir Hakim McCain,**

Plaintiff

v.

**JOHN E. WETZEL, Secretary
of Corrections; KERI MOORE;
JAMES C. BARNACLE;
JOSEPH NISH; JOSEPH J.
VINANSKY; CORRECTIONAL
OFFICER ROEGNER;
CORRECTIONAL OFFICER
NEVINS; LIEUTENANT SMITH;
BRIAN COLEMAN; RHONDA
HOUSE, and LIEUTENANT
CRUMB,**

Defendants

CIVIL NO. 1:12-CV-0789

(Judge Rambo)

(Magistrate Judge Schwab¹)

MEMORANDUM

I. Procedural History

Before the court is a report and recommendation (doc. 50) filed by the magistrate judge on October 25, 2012. On November 9, 2012, Plaintiff filed a motion for extension of time to file objections to the report and recommendation (doc. 54). On November 21, 2012, Plaintiff filed a motion for an extension of time to file an amended complaint (doc. 55). On November 23, 2012, Plaintiff filed objections to the report and recommendation (doc. 56). On December 10, 2012, Defendants filed a response to Plaintiff's objections to the report and recommendation (doc. 57). This matter is ripe for disposition.

¹This case was originally referred to Magistrate Judge J. Andrew Smyser. Upon his retirement, the case was temporarily transferred to Magistrate Judge Martin Carlson pending appointment of Magistrate Judge Smyser's successor, Magistrate Judge Susan E. Schwab.

II. Background

Plaintiff, Amir Hakim McCain, a state inmate, brought this civil rights action against eleven different prison officials, in which he claims that Defendants retaliated against him because he sought to bring criminal charges against prison officials. McCain also claims that the retaliation included sexual assaults in connection with strip searches and destruction of his legal property. Finally, McCain also claims that the destruction of his legal property violated his right of access to the courts.

Defendants filed a motion to dismiss McCain's complaint (doc. 20). McCain filed a motion to deny Defendants' motion to dismiss (doc. 28) and a brief in support thereof (doc. 37). Because the proper way to oppose a motion to dismiss is to file a brief in opposition to the motion, not a separate motion to deny the motion, the magistrate judge recommended that McCain's motion to deny be dismissed as a separate motion but that it be considered as McCain's brief in opposition to Defendants' motion to dismiss the complaint.

After a thorough review of the complaint, and the law applicable to the requirements for proper pleadings, the magistrate judge recommended that Defendants' motion to dismiss (doc. 20) be granted in part and denied in part; that the access-to-the-courts claims, the due process property claims, and the claims against Defendants Wetzel, Moore, Barnacle, Nish, Vinansky, Smith, Coleman, and House, be dismissed. The magistrate judge further recommended that the motion to dismiss otherwise be denied; that McCain's motion (doc. 28) to deny the motion to dismiss otherwise be dismissed, and that McCain be granted leave to file an amended complaint. Finally, the magistrate judge recommended that the case be remanded to the magistrate judge.

III. Discussion

In his objections to the report and recommendation of the magistrate judge, McCain addresses the magistrate judge's recommendation of dismissal of his access to court claim.² In his argument, McCain adds additional facts on this claim that were not set forth in his complaint. Defendants, in their response to McCain's objection to the report and recommendation, cite to *Frederico v. Home Depot*, 507 F.3d 188, 201-02 (3d Cir. 2007), for the proposition that "courts do not consider after the fact allegations in determining the sufficiency of [a] complaint under Rule [] . . . 12(b)(6)." (Doc. 57 at p. 4.)

Since the magistrate judge recommended that McCain be given an opportunity to amend his complaint, Plaintiff can assert those additional facts set forth in his objections to the report and recommendation in an attempt to support his claim of denial of access to the court.

IV. Conclusion

No other objections were made by McCain and, therefore, this court will adopt the report and recommendation of the magistrate judge. An appropriate order will be issued.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: December 19, 2012.

² No other portion of the report and recommendation is challenged by McCain.

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3) Defendants' motion to dismiss is **GRANTED in part** as to the following claims: access to the courts, due process property claims, and the claims against Defendants Wetzel, Moore, Barnacle, Nish, Vinansky, Smith, Coleman, and House, are dismissed. The motion to dismiss is otherwise denied.

4) Plaintiff's motion and brief to deny the motion to dismiss (docs. 28 & 37) are deemed to be a brief in opposition to the motion to dismiss. The motion to deny is otherwise dismissed.

5) Plaintiff's motion for an extension of time to file an amended complaint (doc. 55) is **GRANTED**. Plaintiff is granted leave to file an amended complaint no later than January 22, 2013.

6) This matter is remanded to Magistrate Judge Schwab.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: December 19, 2012.